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Supreme Court, U.S.
FILED

Nº. 97-1729 APR 22 1998

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In The

Supreme Court of The United States

October Term 1997

BURTON C. TITUS, et al.

Petitioners,

v.

MICHAEL GUZZEY

Respondent.

Petition For A Writ Of Certiorari To the Court of Appeals for the State of New York

---

PETITION FOR WRIT OF CERTIORARI

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62 pp

QUESTION PRESENTED FOR REVIEW

Whether the "extraordinary circumstances" standard first announced in the New York State Court of Appeals decision of Matter of Bennett v. Jeffreys, 40 N.Y.2d 543 (1976) and followed in the present matter, subjects two sibling brothers to invidious discrimination in their civil rights despite the neutrality of New York State's custody statute on its face in that the automatic preference that the standard mandates in favor of one sibling's biological parent over the rights of the sibling brothers to live together discriminates against the fundamental liberty interest of the sibling brothers to associate and maintain a familial relationship and whether this disadvantaged class created by State action suffers disproportionate detriment to the public purposes the standard is likely to achieve, and is therefore an intrusive regulation of the family as defined in Santosky v. Kramer, 455 U.S. 745 (1982); Moore v. East Cleveland, 431 U.S. 494 (1977) and Cleveland Board of Education v. LaFleur, 414 U.S. 632 (1974), and is therefore violative of the First and Fourteenth Amendments of the United States Constitution.

LIST OF PARTIES TO THE PROCEEDINGS IN THE COURT BELOW

Appellants:

Burton C. Titus
Margaret Titus
Jason Michael Titus, a minor

Appellants reside at: 131 George Street,
Owego, New York 13827

Appellants Attorneys: Somma & Sullivan, Attorneys at Law,
501 Plaza Drive,
Vestal, New York 13850

Private Retained Law Guardian for Jason Michael Titus, a minor: Michael A. Somma, Esq. and Michael J. Sullivan, Esq., Somma & Sullivan, Attorneys at Law, 501 Plaza Drive, Vestal, New York 13850

Appellee:

Michael Guzzey

Appellee resides at: 250 Hoadley Hill Road,
Windsor, New York 13865

Appellees Attorney: Thomas A. Muscatello, Esq.,
502 Press Building,
19 Chenango Street,
Binghamton, New York 13901

Family Court·Appointed Law Guardian for the Child, Tyler A. Guzzey (Titus) Retained by the State of New York:
Sandra Garufy, Esq., Garufi & Garufy, 45 Chenango Street, Binghamton, New York 13901.

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2. Motion of Leave to Appeal, Matter of Guzzey v. Titus, et al., leave denied 87 N.Y.2d 807, 641 N.Y.S.2d 829 (1996)
3. Matter of Titus, et al. v. Guzzey, No. 79576, slip op entered November 13, 1997 (3rd Dept. 1997)
4. Motion of Court of Appeals to Dismiss Appeal, Matter of Titus, et al. v. Guzzey, Motion No. 176 SSD 8, slip op entered February 19, 1998 (1998)

STATEMENT OF JURISDICTION

The Court from which this appeal is taken is the Court of Appeals of the State of New York. The Notice of Appeal to the Court of Appeals was served on November 28, 1997 upon the parties and the Solicitor General of the State of New York and served upon the Court Clerk of the Tioga County Family Court on December 1, 1997. Notice of Appeal was served upon the Court of Appeals on December 2, 1997.

The Order appealed from was served by mail by the claimant/appellants on Thomas Muscatello, Esq., attorney for the respondent/appellee and Sandra J. Garufy, Esq., the Law Guardian for Tyler Guzzey (Titus) on November 26, 1997.

The Court of Appeals of the State of New York issued a Decision and Order on February 19, 1998 which dismissed the appeal of the appellants sua sponte, on the ground that no substantial constitution question is directly involved. The Court of Appeals had examined sua sponte whether it had subject matter jurisdiction over the appeal pursuant to §500.3 of the Rules of Practice of the Court of Appeals of the State of New York.

Appellants had appealed the Memorandum and Order of the Supreme Court-Appellate Division, Third Judicial Department as of right pursuant to the Civil Practice Law and Rules, Rule 5601(b)(1) and (2), on November 26, 1997. The Memorandum and Order of the Supreme Court-Appellate Division, Third Judicial Department was decided and entered

on November 13, 1997.

The Supreme Court of the United States has jurisdiction to consider the issues presented in the Petition for a Writ of Certiorari pursuant to 28 U.S.C. § 1257(a) as the Court of Appeals of the State of New York has rendered a final judgment or decree and the validity of § 651 of the Family Court Act of the State of New York is drawn into question on the grounds that it is repugnant to the Constitution, treaties and laws of the United States, and the New York Statute is repugnant to the title, right, privileges and immunities of the subject sibling brothers under the Constitution of the United States.

As the constitutionality of § 651 of the Family Court Act is drawn into question, and neither the State of New York or any agnecy, officer or employee thereof is a party to the current action, and the petition for a Writ of Certiorari to the Supreme Court of the United States shall be served upon the Attorney General of the State of New York.

UNITED STATES CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

AMENDMENT I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

AMENDMENT XIV

SECTION 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

ADDITIONAL STATUTORY PROVISIONS

§651 of the Family Court Act of the State of New York.

Article 1, Section 11 of the Constitution of the State of New York.

STATEMENT OF THE CASE

On July 28, 1993 a blood vessel burst inside the brain of Rose Titus, causing her death. At the time of this tragic event, Rose Titus had two children, Jason Titus and Tyler Titus. Shortly thereafter, grandparents Burton and Margaret Titus filed two separate Petitions in Tioga County Family Court for custody of Jason and Tyler. Craig York did not contest the Custody Petition filed on behalf of Jason, and agreed in Court to the award of custody of Jason to the Tituses.

Tyler's father, who had never lived with Rose Titus, contested the Custody Petition. In September 1993, an Order was signed by Judge Vincent Sgueglia of the Tioga County Family Court granting joint custody of Tyler Titus to the Tituses and Michael Guzzey, the biological father. Primary residence of Tyler at that time was to remain with the Tituses. The parties developed an immediate, deep-seated animosity towards each other and these feelings culminated in Michael Guzzey applying to the Court on March 7, 1994 for a change in custody. A lengthy five day trial resulted in the Decision of the Court to change custody of Tyler to Michael Guzzey, his biological father. On December 14, 1994 Judge Vincent Sgueglia signed a Decision and Order finding that there were no extraordinary circumstances present and as such, the grandparents had no right to contest the custody of Tyler. The Decision was immediately appealed.

On October 26, 1995 the Appellate Division of the Third Department issued a Decision on the appeal which upheld the change in custody. The Appellate Court found that the separation of the two brothers; without more, does not constitute an extraordinary circumstance that would preclude Michael Guzzey from receiving custody.

Shortly before Tyler moved to the home of Michael Guzzey in June, 1995, Chris Lauback, school psychologist for the Owego-Apalachin Central School District reported that Jason was having problems dealing with the impending separation from his brother. These problems were further documented by a clinical social worker from the Tioga County Department of Mental Hygiene and by psychologist Chris Lauback again in the fall of 1995. Jason's continuing problems led the Tituses to Petition for increased visitation between Tyler and Jason in November, 1995. This Petition was denied.

In the months following the change in custody to Michael Guzzey's residence, Michael Guzzey embarked upon a conscious course of conduct designed to drive a wedge between Tyler and the Tituses. During this period, Tyler also experienced behavioral problems due to the separation from his brother and the actions of Michael Guzzey. This situation led to the submission of a new Petition by the Tituses on June 7, 1996.

The Tituses' Modification Petition alleged that a change of circumstances had occurred in that Michael

Guzzey's course of conduct in isolating the brothers from each other had resulted in the infliction of severe emotional trauma to both brothers, an "extraordinary circumstance". The Petition also objected to the State of New York's automatic, absolute preference given to the father by the Court of Appeals Decision in Matter of Bennett v. Jeffreys, 40 NY2d 543 (1976), especially as that preference applied to Jason Titus, the sibling brother of Tyler Titus. A Memorandum of Law on this issue was submitted to the Court on June 7, 1996, on the date the Petition was filed.

The appellants brought their case before the Court in October, 1996. Upon the conclusion of testimony on January 31, 1997, Judge Vincent Sgueglia issued a bench decision rejecting the Tituses Petition. The Court declined to deviate from the standard required under Matter of Bennett v. Jeffreys, 40 NY2d 543 (1976), in making its decision. On February 25, 1997 Judge Vincent Sgueglia signed the Order of the Court and it was entered by the Clerk of the Family Court on March 3, 1997. Appellants served a Notice of Appeal upon the Court on March 5, 1997. On November 13, 1997 the Appellate Division of the Third Department again rejected the appellants' constitutional arguments.

The Appellate Division of the Third Judicial Department rejected the petitioners' contention that a sibling child has equally strong constitutionally protected rights to family with both his sibling brother and his biological father. The Appellate Division stated: "(a)lthough the standard of

Matter of Bennett v. Jeffreys (supra) indicates that the presumptive right of a parent to custody of a child can only be thwarted by a showing of extraordinary circumstances, and that, as a result, has the effect of subrogating a child's right to live with his or her sibling, the application of this standard protects the fundamental right of biological parents to raise their children. (see, Stanley v. Illinois, 405 U.S. 645, 651. By including extraordinary circumstances as a basis for deviating from this presumption, the Court of Appeals had adequately provided for the protection of the interest of a child in situations where the state has a legitimate interest in interfering with the parents right to raise their child." Memorandum and Order of the Appellate Division, Third Judicial Department, Matter of Titus v. Guzzey, Slip Opinion dated November 13, 1997, page 4.

On November 28, 1997 the appellants served upon the parties, Law Guardian, Tioga County Family Court and the New York State Solicitor General, a Notice of Appeal as of Right on Constitutional Grounds to the New York State Court of Appeals. The Notice of Appeal was filed with the Clerk of the Court of Appeals on December 2, 1997. Appellants' attorneys were notified on December 8, 1997 that the Court of Appeals would conduct a sua sponte inquiry on the issue of whether a substantial constitutional question is directly involved to support an appeal as of right. On December 15, 1997, appellants' attorneys filed a lengthy statement in support of the Court of Appeals retaining subject matter

jurisdiction.

On February 19, 1998 the New York State Court of Appeals entered an Order which dismissed the appellants' appeal sua sponte upon the ground that no substantial constitutional question is directly involved. This Petition for a Writ of Certiorari to the United States Supreme Court ensued.

ARGUMENT FOR GRANTING OF A WRIT OF CERTIORARI

In the November 13, 1997 Memorandum and Order of the Supreme Court-Appellate Division, Third Judicial Department of the State of New York, the Appellate Court admitted that the legal standard employed by New York State Courts has the effect of subrogating a child's right to live with his or her sibling. Despite this subrogation of the child Tyler's right to a family relationship with his sibling brother, the Appellate Court found that the application of the "extraordinary circumstances" standard; where a biological parent's fundamental right to raise their children can be interfered with, adequately provides for the protection of a child such as Tyler Titus in the case at hand. See, Matter of Guzzey v. Titus, No. 79576, slip op. at 4 (3rd Dept. 1997) (Apdx B - 10).

Thus, Memorandum and Order from the Appellate Division of the Third Judicial Department of New York State makes clear that the legal standard used by the New York Courts in a private custody proceeding subrogates the fundamental liberty interests of one group; that of half-brothers or half-sisters wishing to live with each other, to the fundamental liberty interests of another group; that of biological parents to raise their children. When State action is as openly discriminatory as the standard employed by New York State in the present situation, the State action at least

theoretically violates the Equal Protection clause of the United States Constitution. However, the Supreme Court of the United States has found that not all such State actions in fact violate the Equal Protection clause of the Fourteenth Amendment.

In Eisenstadt v. Baird, the Court stated that the "Equal Protection clause of that amendment does deny to the states the power to legislate that different treatment be accorded to persons placed by a statute into different classes on the basis of criteria wholly unrelated to the objective of that statute. A classification 'must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.' Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920)." Eisenstadt v. Baird, 405 U.S. 438, 447 (1971).

The present matter clearly fits within those classes of cases in which constitutional review of the standard employed by the State of New York is required. The decisions in the Supreme Court cases such as Moore v. East Cleveland, Roberts v. United States Jaycees and Cleveland Board of Education v. LaFleur, clearly establish that Tyler and Jason Titus have a fundamental right in freedom of personal choice in matters of family life, given the boys' degree of kinship with each other. Likewise, the boys' maternal grandparents, the appellants in the current matter, have the right to advocate on behalf of the sibling brothers their fundamental rights to

the preservation of certain highly personal relationships. In the present matter, the fundamental relationship being the right of the sibling brothers to live together under one roof as a family unit.

The decisions in the Supreme Court cases such as Royster Guano Co. v. Virginia, Eisenstadt v. Baird, Santosky v. Kramer and Lehr v. Robertson establish the scope of review that the standard known as "extraordinary circumstances" must be scrutinized under if it is to pass constitutional muster. As stated in Eisenstadt, the classification must be reasonable, and not arbitrary, and the difference in the treatment between the brothers and grandparents and the biological father in this case must be based upon grounds having a fair and substantial relation to the object of the standard, so that all persons similarly circumstanced shall be treated alike. See Eisenstadt v. Baird, 405 U.S. 438 (1971).

Clearly then, the constitutionality of the standard known as "extraordinary circumstances" as it has evolved since it was first announced by the New York State Court of Appeals in Matter of Bennett v. Jeffreys, 40 NY2d 543 (1976), depends upon whether the sibling brother's fundamental rights to maintain a family relationship with each other is similarly situated with Tyler's rights to be reared by his biological father, and whether the different classifications set forth in the standard known as "extraordinary circumstances" are reasonable and not arbitrary, and bear a

fair and substantial relationship to the object of that standard.

Here, the contesting parties are similarly situated. Both Michael Guzzey, the biological father, and Jason Titus the biological brother, are asserting their rights to be a part of a nuclear family unit with Tyler. Similarly, Tyler's fundamental rights to family relationships exists equally strongly in his relationship with his biological father and with his maternal family, i.e. his sibling brother and his maternal grandparents with whom he had resided continually from the date of his mother's death in July 1993 until the Court ordered separation from his maternal family in June 1995.

The review of the constitutionality of the standard known as "extraordinary circumstances" now hinges upon whether the different classifications for the biological parent over all other persons, whether related to the child or not, bears a reasonable, fair and substantial relationship to the objective that the standard is meant to obtain. Here, as in all cases pertaining to child custody in New York State, the ultimate objective is the best interests of the child.

The "extraordinary circumstances" standard as it has evolved, does not bear a reasonable, fair and substantial relationship to the State's objective. The stated objective of the standard, that a child should reside with his or her biological parent unless the circumstances dictate that the best interest of the child lie in residing somewhere else, cannot be obtained under the standard as it exists today. While the standard works well in ideal situations where the child lives

with the biological parent who cares for and nurtures the child, the standard no longer recognizes that there are situations in which circumstances dictate that the best interest of the child lie in the child residing elsewhere than with the biological parent, especially where the biological parent has not been guilty of any culpable conduct in causing those circumstances.

The Court of Appeals of New York State has long recognized that siblings should be separated only with reluctance. In Obey v. Degling, 37 N.Y.2d 768 (1975), a case that predates Matter of Bennett v. Jeffreys, the Court spoke about the importance of keeping siblings together. The Court stated: "(y)oung brothers and sisters need each other's strengths and association in their everyday and often common experiences, and to separate them, unnecessarily, is likely to be traumatic and harmful. The importance of rearing brothers and sisters together, and thereby nourishing their family bonds, is also strengthened by the likelihood that the parents will pass away before their children. Obey v. Degling, 37 N.Y.2d 768, 771 (1975).

While Obey dealt with custody of children by divorced parents, its result reinforces the failure of the "extraordinary circumstances" standard in any constitutional analysis. The result of Obey, when coupled with the evolved standard of "extraordinary circumstances", is that siblings of divorced parents enjoy the protection of the highest Court of the State against Court ordered separations, while children

who have had the unfortunate tragedy of losing a biological parent have no such protection in situations such as the present matter where Tyler and Jason have the same mother, but different fathers.

Under this analysis, the current standard of "extraordinary circumstances" cannot pass constitutional muster. Because the current status of the standard acts to disenfranchise an ever growing population of sibling brothers and sisters from their constitutional right to familial relationships with their siblings, the standard cannot be said to bear a reasonable fair and substantial relationship with the State's objective. The current status of the standard in effect returns children who live in the State of New York who find themselves in the unfortunate factual situation of Tyler and Jason Titus to the status of mere chattel of biological parents who cannot be said to have committed any culpable conduct in their dealings with the child.

The Court of Appeals, in issuing its sua sponte decision on February 19, 1998 that no constitutional question exists, has once again endorsed the subrogation of siblings and their fundamental liberty interest to maintain family relationships to the perceived paramount fundamental liberty interest of the biological parent to raise his or her family. In so doing, it is of imperative public importance to the children of the State of New York and to the children of the United States as a whole to have the question of whether a State such as New York can constitutionally subrogate the fundamental

liberty interests of siblings who find themselves in the circumstances of Jason and Tyler to live with each other to a "superior" fundamental liberty interest of the biological parent to raise his or her children.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be granted.

Respectfully Submitted,

Michael A. Somma
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501 Plaza Drive
Vestal, New York 13850
(607) 770-8870

APPENDIX A

FAMILY COURT OF THE STATE OF NEW YORK
COUNTY OF TIOGA
OWEGO, NEW YORK

ORDER
FILED, FEBRUARY 25,1997
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At a Term of the Family Court of the State of New York, held in and for the County of Tioga at Owego, New York on January 31, 1997.

PRESENT: HON. VINCENT SGUEGLIA
Family Court Judge

BURTON C. TITUS and MARGARET TITUS, ORDER
Petitioners

vs. Docket Nos. V-1020-21-93

MICHAEL GUZZEY,
Respondent

BURTON C. TITUS and MARGARET TITUS
O/B/O JASON MICHAEL TITUS, A MINOR,
Petitioners

vs. Docket Nos. V-1020-21-93

MICHAEL GUZZEY,
Respondent

NOTICE: YOUR WILLFUL FAILURE TO OBEY THIS ORDER MAY, AFTER COURT HEARING, RESULT IN YOUR COMMITMENT TO JAIL FOR A TERM NOT TO EXCEED SIX MONTHS FOR CONTEMPT OF COURT.

APPEARANCES: Burton C. Titus, Petitioner
Margaret Titus, Petitioner

Michael Guzzey, Respondent
Thomas A. Muscatello, Esq., Attorney
for Respondent
Sandra J. Garufy, Esq., Law Guardian
Richard M. Schwartz, Esq., Attorney
for Petitioners
Michael A. Somma, Esq., Attorney
for Petitioners

This matter having come on before the Court at this time in regard to Petitions filed pursuant to the Family Court Act as follows:

PETITION TYPE	DATE FILED	PETITION MADE BY
Modification of Custody/Visitation	5/29/96	Burton C. & Margaret Titus
Violation of Court Order	6/3/96	Burton C. & Margaret Titus
Violation of Court Order	6/18/96	Burton C. & Margaret Titus

And after the Court having heard testimony from numerous witnesses presented by the Petitioners, the Respondent and the Law Guardian, including three psychologists, and in camera interview with Tyler Guzzey in the presence of the Law Guardian, and having taken into consideration the history of Tyler Aaron Guzzey since the Order of this Court dated November 2, 1994, his relationship

with his father and his half-brother, and his grandparents; and with due deliberation herein, it is the findings of the Court that the Petitioners have not sustained their burden of proving either a substantial change of circumstances or extraordinary circumstances which should cause this court to modify the present custody/visitation Order of this Court; and it is further

The Findings of this Court that the Petitioners have not proved their Petitions stated above of willful violations on the part of Michael Guzzey; and it is therefore

ORDERED that the three Petitions noted above are hereby dismissed.

Dated: Owego, New York
2/25, 1997

ENTER:
/s/ Vincent Sgueglia
Hon. Vincent Sgueglia

CC: Petitioners
Respondent
Thomas A. Muscatello, Esq.
Sandra J. Garufy, Esq.
Richard M. Schwartz, Esq.
Michael A. Somma, Esq.

NOTICE OF ENTRY

PLEASE BE ADVISED THAT THIS DOCUMENT WAS ENTERED IN THE TIOGA COUNTY FAMILY COURT CLERK'S OFFICE ON THE 3 DAY OF MARCH 1997 CLERK /s/ Denise R. Marski

APPENDIX B

NEW YORK
SUPREME COURT - APPELLATE DIVISION
THIRD JUDICIAL DEPARTMENT

Memorandum and Order
Filed, November 13, 1997
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Supreme Court - Appellate Division
Third Judicial Department

Decided and Entered: November 13, 1997 79576

In the Matter of BURTON C. TITUS et al.,

Appellants,

v MEMORANDUM AND ORDER

MICHAEL GUZZEY,

Respondent.

Calendar Date : October 8, 1997

Before: Mikoll, J.P., Crew III, Casey, Yesawich Jr. and Spain, JJ.

Somma & Sullivan (Michael J. Sullivan of counsel), Vestal, for appellants.

Thomas A. Muscatello, Binghamton, for respondent.

Sandra J. Garufy, Law Guardian, Binghamton, for Tyler Titus.

Spain, J.

Appeal from an order of the Family Court of Tioga

County (Sgueglia, J.), entered March 3, 1997, which, inter alia, denied petitioners' application, in a proceeding pursuant to Family Court Act article 6, for modification of a prior custody and visitation order.

In December 1994 respondent's application for custody of his son Tyler (born in 1990) was granted and thereafter affirmed by this court (see, Matter of Guzzey v Titus, 220 AD2d 976, lv denied 87 NY2d 807). In the earlier proceeding petitioners, who are Tyler's maternal grandparents, also sought sole custody of Tyler; however, that application was denied. Petitioners have sole custody of Tyler's half-brother Jason (born in 1986). Tragically, Rose Titus, petitioners' daughter and the children's biological mother, died in July 1993.

In May 1996 petitioners commenced the instant proceeding seeking an order, pursuant to Family Court Act article 6, modifying Family Court's previous order and granting petitioners sole custody of Tyler. Petitioners allege that "there has been a change of circumstances in that respondent has embarked upon a conscious course of conduct which has resulted in the infliction of severe emotional trauma to both brothers which has drastically affected both siblings' welfare and psychological well-being"; in the alternative, petitioners requested expanded visitation with Tyler or, further, that Jason be awarded visitation rights with Tyler. After a hearing wherein Family Court heard the testimony of petitioners, respondent, two of Tyler's maternal aunts, Jason's school psychologist, Tyler's special education

teacher, respondent's life partner and two licensed psychologists, one called on behalf of petitioners and the other on behalf of respondent, and after conducting an in camera interview with Tyler, Family Court dismissed the petition. Family Court stated in its oral decision that it based its determination upon petitioners' failure to adequately set forth respondent's unfitness as a parent and/or the absence of any extraordinary circumstances.[1] Petitioners appeal.

The gravamen of petitioners' application for modification is their genuine and sincere effort to have the children reside together. However, as we have previously stated, "[respondent] should not be precluded from receiving custody of Tyler on that basis alone" (Matter of Guzzey v Titus, 220 AD2d 976, 977, supra). "'It is fundamental that a biological parent has a claim of custody of his or her child, superior to that of all others, in the absence of surrender, abandonment, persistent neglect, unfitness, disruption of custody over an extended period of time or other

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[1]We again determine that Family Court erred by failing to properly set forth "'those facts upon which the rights and liabilities of the parties depend'" (Matter of Guzzey v Titus, 220 AD2d 976, quoting Matter of Jose L.I., 46 NY2d 1024, 1025-1026; see, CPLR 4213 [b]; Family Ct Act § 165). However, we again conclude that "the record is sufficiently complete to allow a custody determination by this Court in the interest of judicial economy and to avoid further delay" (Matter of Guzzey v Titus, at 976; see, Guinan v Guinan, 102 AD2d 963; Matter of Milton v Dennis, 96 AD2d 628).

extraordinary circumstances'" (Matter of Burghdurf v Rogers, 233 AD2d 713, 714, lv denied 89 NY2d 810, quoting Matter of Gray v Chambers, 222 AD2d 753, 753, lv denied 87 NY2d 811; see, Matter of Bennett v Jeffreys, 40 NY2d 543, 546). Furthermore, changes in established child custody should only be made upon a demonstration of a sufficient change of circumstances which show a real need to effect a change in order to insure the best interest and welfare of the child or children, and "[t]hose seeking to displace a biological parent of custody of a child always have the burden of proving the existence of extraordinary circumstances" (Matter of Judware v Judware, 197 AD2d 752, 753: see, Matter of Katherine D. v Christine D., 187 AD2d 587, lv denied 81 NY2d 709).

Upon our review of the record we agree with Family Court that petitioners failed to meet their burden of showing either respondent's unfitness as a parent or the existence of extraordinary circumstances sufficient to warrant a change of custody. Petitioners' claim that respondent "embarked upon a conscious course of conduct which has resulted in the infliction of severe emotional trauma to both brothers" is primarily based upon a December 1996 incident in which respondent and Jason got into a fight, resulting in respondent punishing him by not talking to him, and Jason's subsequent refusal to visit the child at respondent's home. Respondent admitted that he and Jason did indeed have a disagreement and stated that he punished Jason by not talking to him for the remainder of that visit. Although this "silent treatment" may be viewed as inappropriate conduct with unfortunate results,

this one incident clearly does not support a determination that respondent engaged in a "conscious course of conduct".

The remainder of the testimony elicited on petitioners' behalf focused on the significant emotional trauma suffered by the children as a direct result of their separation from one another. In Matter of Burghdurf v Rogers (supra), this court concluded that predicted psychological damage to a child did not rise to the level of extraordinary circumstances absent proof of unfitness or gross misconduct on the part of the parent. Further, factual findings of psychological trauma are "irrelevant and impermissible considerations unless they are sufficient to establish [a] respondent's persistent neglect or unfitness" (Matter of Culver v Culver., 190 AD2d 960, 961). Assuming, arguendo, that Tyler has suffered some degree of emotional trauma as a natural consequence of the separation, we nonetheless conclude that the record is devoid of any proof of neglect, abuse or unfitness on respondent's part, thereby precluding a finding of the existence of extraordinary circumstances.

Further, although we find merit in petitioners' contention that Family Court erred in delaying the proceeding to allow the introduction of respondent's expert testimony (see, Vicinanzo v Vicinanzo, 193 AD2d 962), we conclude that in light of petitioners' failure to overcome their burden on their direct case such error was harmless, especially when our review of the entire record supports Family Court's conclusion (see, Matter of Burghdurf v Rogers, supra; Matter of Culver v Culver, supra).

Next, we flatly reject petitioners' contention that the application of the "extraordinary circumstances" doctrine is violative of the child's constitutional rights. Although the standard of Matter of Bennett v Jeffreys (supra) indicates that the presumptive right of a parent to custody of a child can only be thwarted by a showing of extraordinary circumstances, and that, as a result, has the effect of subrogating a child's right to live with his or her sibling, the application of this standard protects the fundamental right of biological parents to raise their children (see, Stanley v Illinois, 405 US 645, 651). By including extraordinary circumstances as a basis for deviating from this presumption, the Court of Appeals has adequately provided for the protection of the interest of a child in situations where the State has a legitimate interest in interfering with the parents' right to raise their child.

We have considered petitioners' remaining contentions and find them to be without merit.

Mikoll, J.P., Crew III, Casey and Yesawich Jr., JJ., concur.

ORDERED that the corder is affirmed, without costs.

Enter:

/s/ Michael J. Novack
Michael J. Novack
Clerk of the Court

APPENDIX C

STATE OF NEW YORK
COURT OF APPEALS

Notice of Appeal
Filed, November 25, 1997
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***Sua Sponte* Jurisdictional Inquiry**
Letter to Counsel from the Clerk of the Court
Dated, December 8, 1997
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Order with Opinion
Filed, February 19, 1998
Page 17

STATE OF NEW YORK
FAMILY COURT
COUNTY OF TIOGA

BURTON C. TITUS AND
MARGARET TITUS,
Claimant/Appellants,
-vs-

MICHAEL GUZZEY,
Respondent/Appellee

BURTON C. TITUS AND
MARGARET TITUS O/B/O
JASON MICHAEL TITUS,
A MINOR,
Claimant/Appellants,
-vs-

MICHAEL GUZZEY,
Respondent/Appellee.

NOTICE OF APPEAL
TO THE COURT OF
APPEALS ON
CONSTITUTIONAL
GROUNDS
[CPLR 5601(b)(1)&(2)]

Docket Nos.
V-1020-21-93
Third Dept. Case
No. 79576

SIRS:

PLEASE TAKE NOTICE that Burton C. Titus and Margaret Titus, the claimant/appellants herein, and Burton C. Titus and Margaret Titus on behalf of Jason Michael Titus, a minor child, claimant/appellants herein, inclusive, hereby appeal to the Court of Appeals of the State of New York from

the Order of the Appellate Division, Third Department, entered November 13, 1997 which affirmed, in its entirety, the Order of the Tioga County Family Court entered on March 3, 1997 which denied the claimant/appellants requests for custody of Tyler A. Titus and/or increased visitation between Tyler A. Titus and his sibling brother, Jason Michael Titus.

The appeal is taken as of right to CPLR 5601 (b) (1) and (2) from the final Order of the Appellate Division, Third Department, entered November 13, 1997 because the construction of the Constitution of the State and the United States is directly involved and the Decision of the Appellate Court involves the validity of statutory provisions of the State under the Constitution of the State and the United States, and the appeal presents inter alia, the following constitutional questions. Is the "Extraordinary Circumstance" standard which is employed in unsupervised private placement proceedings between a biological parent and a non-parent under §651 of the Family Court Act violative of Article 1, Section 11 of the New York State Constitution and the First and Fourteenth Amendments of the United States Constitution because it subjects two sibling brothers to invidious discrimination in their civil rights and their right to family relationships in that it provides an automatic, inquiry ending preference to a biological parent so long as that parent is found to be "fit" under the case law that has evolved, even in relation to the sibling brothers' rights to a familial relationship with each other.

Dated: Vestal, New York
November 25, 1997

/s/ Michael A. Somma
MICHAEL A. SOMMA
SOMMA & SULLIVAN
Attorneys for
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To: Denise Marsili
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Solicitor General
Department of Law
The Capitol
Albany, New York 12224

December 8, 1997

Michael A. Somma, Esq.
Somma & Sullivan, Esqs.
501 Plaza Drive
Vestal, New York 13850

Re: Titus v Guzzey

Dear Mr. Somma:

The Court has received your 500.2 jurisdictional statement and may examine its subject matter jurisdiction sua sponte with respect to whether the order appealed from finally determines the proceeding within the meaning of the Constitution and whether a substantial constitutional question is directly involved to support an appeal as of right.

This communication is without prejudice to any motion any party may wish to make. If you conclude that the order is not appealable as of right, please arrange for the execution of a stipulation consenting to a dismissal of the appeal and transmit that paper to my office. If a stipulation is to be forthcoming, please inform me immediately.

On the other hand, if you wish to persevere in the appeal, you are invited to present to the Court in writing within ten days of this letter's date your comments justifying the retention of subject matter jurisdiction, including references to the record demonstrating that a constitutional

question was raised in the court or other forum of original instance. Also please enclose a copy of each brief filed in the Appellate Division, as well as a copy of the Record on Appeal or Appendix filed in that court. Your adversary is likewise afforded the opportunity to comment in writing on the subject matter jurisdiction.

If this sua sponte inquiry is terminated by the Court, the Clerk will notify counsel in writing and set a new schedule for normal perfecting of the appeal.

Very truly yours,

/s/ Stuart M. Cohen
Stuart M. Cohen

SC: ml
cc: All Counsel

(*Sua sponte* jurisdictional inquiry letter from the Clerk of the Court, State of New York Court of Appeals)

STATE OF NEW YORK,
COURT OF APPEALS

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the nineteenth day of February 1998

PRESENT, HON. JUDITH S. KAYE, *Chief Judge, presiding.*

Mo. No. 176 SSD 8

In the Matter of Burton C. Titus et al.,

Appellants,

v.

Michael Guzzey,

Respondent.

The appellants having filed notice of appeal in the above title and due consideration having been thereupon had, it is

ORDERED, that the appeal be and the same hereby is dismissed without costs, by the Court sua sponte, upon the ground that no substantial constitutional question is directly involved.

/s/ Stuart M. Cohen
Stuart M. Cohen
Clerk of the Court

DECISION February 19, 1998

Mo. No.176 SSD 8
In the Matter of
Burton C. Titus
et al.,
Appellants,
v.
Michael Guzzey,
Respondent.

Appeal dismissed without costs, by the Court sua sponte, upon the ground that no substantial constitutional question is directly involved.

32 In the Matter of MICHAEL GUZZEY, Respondent, v BURTON C. TITUS et al., Appellants. [632 NYS2d 872] - Spain, J. Appeals from an order and an amended order of the Family Court of Tioga County (Sgueglia, J.), entered December 9, 1994 and December 14, 1994, which granted petitioner's application, in a proceeding pursuant to Family Court Act article 6, for custody of petitioner's child.

Petitioner and Rose Titus (now deceased) are the biological parent's of Tyler (born May 4, 1990); respondents are Tyler's maternal grandparents. Rose, until the time of her death in July 1993, was Custodial parent of both Tyler and his half brother, Jason (born May 20, 1986). After Rose's death respondents petitioned for custody of Tyler and Jason; petitioner thereupon cross-petitioned for custody of Tyler. An order was entered September 28, 1993, upon the stipulation of the parties, in which Family Court, *inter alia*, granted sole custody of Jason to respondents and joint custody of Tyler to petitioner and respondents, with respondents receiving physical custody of Tyler and petitioner being allowed visitation privileges.

Petitioner commenced this proceeding in March 1994 seeking sole custody of Tyler; respondents then filed a petition to modify the previous order, seeking sole custody of Tyler. Following a fact-finding hearing, Family Court awarded sole custody of Tyler to petitioner and allowed respondents to have visitation with the child. Respondents appeal contending that Family Court (1) failed to properly set forth those facts upon which it based its custody

determination, and (2) applied the incorrect standard of law in making its custody determination.

We affirm. Although Family Court applied the correct legal standard in both its oral decision and the orders appealed from, it erred by failing to properly set forth "those facts upon which the rights and liabilities of the parties depend" (*Matter of Jose L. I.*, 46 NY2d 1024, 1025-1026; *see*, CPLR 4213 [b]; Family Ct Act § 165); however, the record is sufficiently complete to allow a custody determination by this Court in the interest of judicial economy and to avoid further delay (*see*, *Guinan v. Guinan*, 102 AD2d 963; *Matter of Milton v Dennis*, 96 AD2d 628). "It is well established that as between a biological parent and a third person, parental custody may not be precluded absent a threshold showing of extraordinary circumstances * * * Accordingly, a parent may not be deprived of the custody of a child absent surrender, abandonment, persisting neglect; unfitness or other like extraordinary circumstances * * * Unless and until this condition is satisfied, the question of a child's best interest is simply not reached" (*Matter of Zamoiski v Centeno*, 166 AD2d 781, 782, *lv denied* 77 NY2d 803, quoting *Matter of Bennett v Jeffreys*, 40 NY2d 543, 544 [citations omitted]). In support of their contention that petitioner is an unfit parent, respondents presented evidence that petitioner, *inter alia*, had little contact with the child's mother during her pregnancy and had only sporadic contact after his birth until the mother's death. However, petitioner's uncontroverted testimony demonstrates that his attempts to visit were frustrated because

she frequently changed residences and did not own a telephone. The record further reveals that petitioner had maintained consistent contact with Tyler since paternity was established and had repeatedly requested that respondents allow him additional visitation with his son; additionally, petitioner had a full-time job with a positive employment record and was current on his child support payments, while also making regular payments on an arrearage arising from the confinement costs of Tyler's mother. Viewed as a whole, the evidence in the record does not demonstrate either petitioner's unfitness or the existence of extraordinary circumstances which should divest petitioner of his right to enjoy custody of his son (*see, Matter of Culver v Culver*, 190 AD2d 960, 961; *Matter of Abaire v Himmelberger*, 163 AD2d 626; *Matter of Tyrrell v Tyrrell*, 67 AD2d 247, *affd* 47 NY2d 937). The fitness of respondents, which is clear from the record, is immaterial since the threshold burden of establishing extraordinary circumstances has not been met.

Finally, although respondents contend that the separation of Tyler and Jason amounts to extraordinary circumstances, we are of the view that petitioner should not be precluded from receiving custody of Tyler on that basis alone; we conclude that, under the circumstances of this case, the separation of the children does not rise to the level of extraordinary circumstances (*see, Matter of Tyrrell v Tyrrell, supra*, at 250-251).

Mikoll, J. P., Crew III, White and Yesawich Jr., JJ., concur. Ordered that the order and amended order are

affirmed, without costs.

MOTIONS FOR LEAVE TO APPEAL

*** Pg. 807 ***

Decided February 13, 1996

American Intl. Group,
Inc. v. Rosa ... (1st Dept.: -- AD2d --) .... denied
Baker, Matter of ,
v. Town of
Roxbury ..... (3d Dept.: 220 AD2d 961) ... denied
Bonilla, Matter of,
v. Coombe .... (3d Dept.: 221 AD2d 782) ... denied
Bonilla, Matter of
v. New York State
Dept. of
Social Servs. .. (1st Dept.: 219 AD2d 526) ... denied
Doyle, Matter of
v. Aison ..... (3d Dept.: 216 AD2d 634) ... denied
Giladov v.
Kurzweil ..... (2d Dept.: 220 AD2d 481) ... denied
Great Neck Obstetrics
& Gynecology, P. C.
v. Bellucci .... (2d Dept.: 218 AD2d 782) ... denied
Guzzey, Matter of
v. Titus ..... (3d Dept.: 220 AD2d 976) ... denied

*** Pg. 807 ***